

Letter of Findings Number: 04-20150691
Sales Tax
For Tax Years 2012-14

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Business was not responsible for collecting sales tax on service charges for food service and audio/visual equipment. Sales tax was therefore not due on those amounts during the audit years. Imposition of penalties was warranted.

ISSUES

I. Sales Tax—Food and Beverage Service Charges.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-1-20; IC § 6-2.5-2-1; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-4-8](#); [45 IAC 2.2-5-39](#); [45 IAC 2.2-5-44](#); Sales Tax Information Bulletin 7 (August 2011); Sales Tax Information Bulletin 41 (September 2010); Sales Tax Information Bulletin 41 (January 2014).

Taxpayer protests the imposition of sales tax on certain food and beverage service charges.

II. Sales Tax—Audio/Visual Service Charges.

Authority: IC § 6-2.5-1-5; IC § 6-2.5-2-1; IC § 6-2.5-4-10; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dept. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-4-27](#).

Taxpayer protests the imposition of sales tax on audio/visual service charges.

III. Tax Administration—Miscellaneous.

Authority: IC § 6-8.1-4-2; Information Bulletin 41 (September 2010); Sales Tax Information Bulletin 41 (January 2014).

Taxpayer protests two administrative issues.

IV. Tax Administration—Penalties.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of penalties.

STATEMENT OF FACTS

Taxpayer operates a hotel in Indiana with meeting rooms available for rent. As the result of an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had not collected and remitted the proper amount of sales tax on certain taxable transactions and had not remitted the proper amount of use tax due during the 2012, 2103, and 2014 tax years. The Department therefore issued proposed assessments for additional sales tax, penalties, and interest for those years. Taxpayer protested portions of the proposed assessments, stating that it was not required to collect and remit sales tax on some of the transactions at issue, as well as protesting the

imposition of penalties. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales Tax—Food and Beverage Service Charges.

DISCUSSION

Taxpayer protests the imposition of sales tax on amounts it charged its customers when the customers rented meeting rooms in Taxpayer's hotel and also paid Taxpayer to provide food for the meeting. The Department considered the charge associated with the provision of food to be a mandatory gratuity and therefore part of the overall amount subject to sales tax on the transaction. Taxpayer disagrees with the Department's determination of what the charges were actually for and states that the charges were not subject to sales tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v. Caterpillar, Inc.*, 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Next, IC § 6-2.5-4-1 provides:

- (a) A person is a retail merchant making a retail transaction when the person engages in selling at retail.
- (b) A person is engaged in selling at retail when, in the ordinary course of the person's regularly conducted trade or business, the person:
 - (1) acquires tangible personal property for the purpose of resale; and
 - (2) transfers that property to another person for consideration.
- (c) For purposes of determining what constitutes selling at retail, it does not matter whether:
 - (1) the property is transferred in the same form as when it was acquired; (2) the property is transferred alone or in conjunction with other property or services; or
 - (3) the property is transferred conditionally or otherwise.
- (d) Notwithstanding subsection (b), a person is not selling at retail if the person is making a wholesale sale as described in section 2 of this chapter. However, in the case of sales of gasoline (as defined in [IC 6-6-1.1-103](#)), a person shall collect the gasoline use tax as provided in [IC 6-2.5-3.5](#).
- (e) The gross retail income received from selling at retail is only taxable under this article to the extent that the income represents:
 - (1) the price of the property transferred, without the rendition of any service; and
 - (2) except as provided in subsection (g), any bona fide charges which are made for preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records. For purposes of this subsection, a transfer is considered to have occurred after delivery of the property to the purchaser.
- (f) Notwithstanding subsection (e):
 - (1) in the case of retail sales of special fuel (as defined in [IC 6-6-2.5-22](#)), the gross retail income received from selling at retail is the total sales price of the special fuel minus the part of that price attributable to tax imposed under [IC 6-6-2.5](#) or Section 4041(a) or Section 4081 of the Internal Revenue Code; and
 - (2) in the case of retail sales of cigarettes (as defined in [IC 6-7-1-2](#)), the gross retail income received from selling at retail is the total sales price of the cigarettes including the tax imposed under [IC 6-7-1](#).

(g) Gross retail income does not include income that represents charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. However, the exclusion under this subsection only applies if the charges for the serving or delivery are stated separately from the price of the food and food ingredients when the purchaser pays the charges.

(Emphasis added).

The Department's audit report referred to IC § 6-2.5-1-5(a), which states:

(a) Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage charges that are not separately stated on the invoice, bill of sale, or similar document, handling, crating, and packing. Delivery charges do not include postage charges that are separately stated on the invoice, bill of sale, or similar document.

(Emphasis added).

Also, in the audit report the Department referred to [45 IAC 2.2-4-8](#)(e), which provides:

The tax is imposed on the gross receipts from "furnishing" an accommodation. The gross receipts subject to tax include the amount which represents consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation. Such amounts are subject to tax even when they are separately itemized on the statement or invoice.

Additionally, the Department's audit report referred to Sales Tax Information Bulletin 7 (August 2011) 20110928 Ind. Reg. 045110516NRA ("Information Bulletin 7") which provides in relevant part:

Gratuities are not taxable when they result from an unsolicited, affirmative action on the part of the customer to reward good service. Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax. However, this exclusion only applies if the charges for the serving are stated separately from the price of the food and/or beverages when the purchaser pays the charge. Charges for delivery of prepared food, whether segregated or not, are subject to sales tax. (Emphasis added).

The Department reviewed Taxpayer's accounts and concluded that Taxpayer added a taxable service charge to the amount charged for the catering it provided its customers. This, the Department determined, meant that the charges were representative of the cost of Taxpayer's labor or service cost and so were included in gross retail income under IC § 6-2.5-1-5(a)(2) and/or IC § 6-2.5-1-5(a)(3). Further, the Department considered that the service charges were consideration for the rendition of those services which are essential to the furnishing of the accommodation, and those services which are regularly provided in furnishing the accommodation, which would make the service charges subject to sales tax under [45 IAC 2.2-4-8](#)(e). Finally, the Department considered that its position was verified by Information Bulletin 7, in which the Department explained that charges for delivery of prepared food, whether segregated or not, are subject to sales tax.

While IC § 6-2.5-1-5(a) does contain the language cited by the Department, it is a general definitional statute while a more specific statutory exclusion is provided by the Indiana Code. IC § 6-2.5-4-1(g) provides that gross retail income does not include income that represents separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. In this case, the service charges were directly associated with the cost of serving food furnished, prepared or served for consumption at a location and on equipment provided by the retail merchant.

Regarding the Department's reference to Information Bulletin 7, while the information bulletin does contain the sentence referring to delivery charges it also plainly states, "Charges for serving food or beverages furnished, prepared, or served for consumption at a location, or on equipment provided by the retail merchant are not subject to sales tax.", thereby echoing the language of IC § 6-2.5-4-1(g). Also, Sales Tax Information Bulletin 41 (January 2014) 20140129 Ind. Reg. 045140014NRA ("Information Bulletin 41") (preceded by Sales Tax Information Bulletin 41 (September 2010) 20100929 Ind. Reg. 045100600NRA, which was in effect during the first two years of the protest) provides a detailed matrix which explains the Department's position regarding the application of sales tax to various aspects of furnishing accommodations, including service charges associated with serving food and beverages. That matrix states that separately stated service charges for serving food and beverages are not subject to sales tax. While this iteration of Information Bulletin 41 was not in effect until the last year of the audit period, it does not reflect a change in the Department's interpretation of the relevant statutes. Rather it is a clarification and confirmation of the Department's position for all three years of the audit period.

Therefore, the matrix in Information Bulletin 41 is applicable to all three audit years in the instant case. Consequently, both Information Bulletin 7 and Information Bulletin 41 confirm that the Department did not consider separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant to constitute gross retail income subject to sales tax as described by [45 IAC 2.2-4-8\(e\)](#). Instead, the Department considered those charges to fall under the provisions of IC § 6-2.5-4-1(g).

In conclusion, Taxpayer has established that the service charges it charged its customers for food and beverage services were separately stated on the invoices. IC § 6-2.5-4-1(g) plainly states that sales tax does not apply to income that represents separately stated charges for serving or delivering food and food ingredients furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant. Moreover, the Department has established its position, via the matrix in Information Bulletin 41, that in the context of providing accommodations separately stated service charges for serving food and beverages are not subject to sales tax. Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

II. Sales Tax–Audio/Visual Service Charges.

DISCUSSION

Taxpayer protests the imposition of sales tax on amounts it charged its customers when the customers who rented meeting rooms in Taxpayer's hotel also arranged with Taxpayer for a third party vendor ("Vendor") to provide audio/visual ("A/V") equipment for the meeting. Taxpayer included the rental charge on the invoice it provided to its customers, along with a separately stated service charge that Taxpayer added to the amount charged by Vendor. The Department considered the charge associated with the provision of A/V equipment to be a part of the overall amount subject to sales tax on the transaction. Taxpayer disagrees with the Department's determination of what the charges were actually for and states that the charges were not subject to sales tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dept. of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dept. of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" *Dept. of State Revenue v.*

Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Also, IC § 6-2.5-4-10 states:

- (a) A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person other than for subrent or sublease.
- (b) A person is a retail merchant making a retail transaction when the person sells any tangible personal property which has been rented or leased in the regular course of the person's rental or leasing business.
- (c) Notwithstanding subsection (a), a person is not a retail merchant making a retail transaction when the person rents or leases motion picture film, audio tape, or video tape to another person. However, this exclusion only applies if:
 - (1) the person who pays to rent or lease the film charges admission to those who view the film; or
 - (2) the person who pays to rent or lease the film or tape broadcasts the film or tape for home viewing or listening. (Emphasis added).

Also of relevance is IC § 6-2.5-1-5(a), which states:

Except as provided in subsection (b), "gross retail income" means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property is sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for:

- (1) the seller's cost of the property sold;
- (2) the cost of materials used, labor or service cost, interest, losses, all costs of transportation to the seller, all taxes imposed on the seller, and any other expense of the seller;
- (3) charges by the seller for any services necessary to complete the sale, other than delivery and installation charges;
- (4) delivery charges; or
- (5) consideration received by the seller from a third party if:
 - (A) the seller actually receives consideration from a party other than the purchaser and the consideration is directly related to a price reduction or discount on the sale;
 - (B) the seller has an obligation to pass the price reduction or discount through to the purchaser;
 - (C) the amount of the consideration attributable to the sale is fixed and determinable by the seller at the time of the sale of the item to the purchaser; and
 - (D) the price reduction or discount is identified as a third party price reduction or discount on the invoice received by the purchaser or on a coupon, certificate, or other documentation presented by the purchaser.

For purposes of subdivision (4), delivery charges are charges by the seller for preparation and delivery of the property to a location designated by the purchaser of property, including but not limited to transportation, shipping, postage charges that are not separately stated on the invoice, bill of sale, or similar document, handling, crating, and packing. Delivery charges do not include postage charges that are separately stated on the invoice, bill of sale, or similar document.

Also, in the audit report the Department referred to [45 IAC 2.2-4-27](#), which states:

- (a) In general, the gross receipts from renting or leasing tangible personal property are taxable. This regulation [[45 IAC 2.2](#)] only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.
- (b) Every person engaged in the business of the rental or leasing of tangible personal property, other than a public utility, shall be deemed to be a retail merchant in respect thereto and such rental or leasing transaction shall constitute a retail transaction subject to the state gross retail tax on the amount of the actual receipts from such rental or leasing.
- (c) In general, the gross receipts from renting or leasing tangible personal property are subject to tax. The rental or leasing of tangible personal property constitutes a retail transaction, and every lessor is a retail

merchant with respect to such transactions. The lessor must collect and remit the gross retail tax or use tax on the amount of actual receipts as agent for the state of Indiana. The tax is borne by the lessee, except when the lessee is otherwise exempt from taxation.

(d) The rental or leasing of tangible personal property, by whatever means effected and irrespective of the terms employed by the parties to describe such transaction, is taxable.

(1) Amount of actual receipts. The amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. The gross receipts include any consideration received from the exercise of an option contained in the rental or lease agreement; royalties paid, or agreed to be paid, either on a lump sum or other production basis, for use of tangible personal property; and any receipts held by the lessor which may at the time of their receipt or some future time be applied by the lessor as rentals.

(2) Rental or lease period. For purposes of the imposition of the gross retail tax or use tax on rental or leasing transactions, each period for which a rental is payable shall be considered a complete transaction. In the case of a weekly rate, each week shall be considered a complete transaction. In the case of a continuing lease or contract, with or without a definite expiration date, where rental payments are to be made monthly or on some other periodic basis, each payment period shall be considered a completed transaction.

(3) Renting or leasing property with an operator:

(A) The renting or leasing of tangible personal property, together with the services of an operator shall be subject to the tax when control of the property is exercised by the lessee. Control is exercised when the lessee has exclusive use of the property, and the lessee has the right to direct the manner of the use of the property. If these conditions are present, control is deemed to be exercised even though it is not actually exercised.

(B) The rental of tangible personal property together with an operator as part of a contract to perform a specific job in a manner to be determined by the owner of the property or the operator shall be considered the performance of a service rather than a rental or lease provided the lessee cannot exercise control over such property and operator.

(C) When tangible personal property is rented or leased together with the service of an operator, the gross retail tax or use tax is imposed on the property rentals. The tax is not imposed upon the charges for the operator's services, provided such charges are separately stated on the invoice rendered by the lessor to the lessee.

(D) Notwithstanding any other provision of this regulation [\[45 IAC 2.2\]](#) any lessee leasing or renting a vehicle(s) from any lessor, including an individual lessor, with or without operators, driver(s), or even if the operator (driver) himself is the lessor, regardless of control exercised, shall not be subject to the gross retail tax or use tax, if the leased or rented vehicle(s) are directly used in the rendering of public transportation.

(4) Supplies furnished with leased property. A person engaged in the business of renting or leasing tangible personal property is considered the consumer of supplies, fuels, and other consumables which are furnished with the property which is rented or leased. (Emphasis added).

The Department considered the service charge to be an element of consideration received prior to the transfer of the rental equipment and so subject to sales tax as provided by [45 IAC 2.2-4-1](#) and [45 IAC 2.2-4-27\(d\)](#).

After review of the A/V service agreement between Taxpayer and Vendor, and review of the invoices Taxpayer gave to its customers, it is clear that the transaction between Taxpayer and its customer is not the type of transaction enumerated by IC § 6-2.5-1-5(a) or contemplated by [45 IAC 2.2-4-27](#). [45 IAC 2.2-4-27\(d\)](#) states that the amount of actual receipts means the gross receipts from the rental or leasing of tangible personal property without any deduction whatever for expenses or costs incidental to the conduct of the business. In the case of the customer's rental of A/V equipment from Taxpayer, the service charge which Taxpayer added to the rental cost was not an expense or cost associated with the conduct of supplying A/V equipment to Taxpayer's customers. Rather, it was an added charge to the direct cost of renting the A/V equipment from Vendor.

As provided in the A/V service agreement between Taxpayer and Vendor, the costs associated with the conduct of the business were borne by Vendor and there were no deductions of those costs. The service charge was separate from the activities associated with Vendor's cost of conducting the rental activities. Therefore, the Department's reference to [45 IAC 2.2-4-27\(d\)](#) is not applicable here. Since this is the only reason given by the Department for imposing tax and since it has been determined that IC § 6-2.5-1-5(a) and [45 IAC 2.2-4-27\(d\)](#) do not apply to this situation, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is sustained.

III. Tax Administration–Miscellaneous.

DISCUSSION

Taxpayer protests two non-legal matters. The first is that the Department's audit determined that Taxpayer was allowed a refund of sales tax which it erroneously calculated on "attrition" charges. Taxpayer paid the sales tax on the attrition charges out of its own accounts. The attrition charges were imposed when a customer entered into a contract with Taxpayer for a certain number of rooms or servings of food but the actual number of rooms or servings used was less than the contracted amount. The attrition charges were based on the number of rooms or servings not used. The Department explained that Sales Tax Information Bulletin 41 (January 2014) 20140129 Ind. Reg. 045140014NRA ("Information Bulletin 41") (preceded by Sales Tax Information Bulletin 41 (September 2010) 20100929 Ind. Reg. 045100600NRA) provides that such charges are not subject to sales tax. IC § 6-8.1-4-2(a)(2) allows the Department to correct mathematical errors on a taxpayer's return. Taxpayer states that the Department did not perform the mathematical correction to reflect the overpayment. The Department will conduct a supplemental audit to verify the status of the approved amount of sales tax remitted and will ensure that the correct amount of sales tax erroneously remitted on the attrition charges is allowed as a credit.

The second non-legal matter concerns the actual bills sent out by the Department after the audit. Taxpayer states that the sales tax bills are overstated because they contain sales tax as well as use tax due for each year of the audit. Taxpayer states that sales tax and use tax are separate taxes and cannot be listed as one amount. Taxpayer is correct that the two taxes are separate and distinct taxes and are not to be considered as one. After the supplemental calculations required by the decisions in this Letter of Findings, the Department will re-issue the bills reflecting the corrected amounts of sales tax and use tax separately.

FINDING

Taxpayer's protests are sustained as provided above.

IV. Tax Administration–Penalties.

DISCUSSION

Taxpayer protests the imposition of penalties pursuant to IC § 6-8.1-10-2.1. Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. [45 IAC 15-11-2\(b\)](#) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2\(c\)](#) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty

assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer protests the Department's assessment of penalties. Taxpayer states that the proposed assessments of penalties are illegal and contrary to law for the reasons that it at all times exercised the level of reasonable care, caution, and diligence expected of an ordinary taxpayer. After review of the documentation and analysis provided in the protest process, the Department does not agree with Taxpayer's position. While Taxpayer has been sustained on the imposition of sales tax on the service charges as described in Issue I and Issue II above, it is also true that there were other instances reported in the audit report where sales tax should have been collected and remitted and where use tax should have been remitted. Even the credit allowed in the case of sales tax erroneously remitted on the attrition charges in Issue III above establishes that Taxpayer did not exercise ordinary business care in performing its tax duties. Therefore, waiver of penalties is not warranted under [45 IAC 15-11-2\(c\)](#). However, penalties will be recalculated to reflect the reduced amount of sales tax due after the Department performs a supplemental audit to implement the determinations in this Letter of Findings.

FINDING

Taxpayer's protest to the imposition of penalties is denied.

SUMMARY

Taxpayer's Issue I protest regarding the imposition of sales tax on food service charges is sustained. Taxpayer's Issue II protest regarding the imposition of sales tax on audio/visual service charges is sustained. Taxpayer's Issue III protest regarding credit for erroneously paid sales tax on attrition charges is sustained pending verification by supplemental audit. Taxpayer's Issue III protests regarding the inclusion of sales tax and use tax on a single bill is sustained and new bills will be issued after recalculation of sales tax due. Taxpayer's Issue IV protest regarding the imposition of penalties is denied, but the penalties will be recalculated to reflect the above-referenced findings.

Posted: 10/26/2016 by Legislative Services Agency
An [html](#) version of this document.